Office-Supreme Court, U.S.
FILED
OCT 4 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 344

MICHIGAN MUTUAL LIABILITY COMPANY, Insurance Carrier, and PITTSTON STEVEDORING CORPORATION, Employer,

Petitioners,

against

PHILIP F. ARRIEN, Deputy Commissioner Second Compensation District, Bureau of Employees Compensation, United States Department of Labor, and ISIDORO PARISI,

Respondents.

REPLY BRIEF OF PETITIONERS

JAMES B. MAGNOR
Counsel for Petitioners,
120 Broadway,
New York, N. Y. 10005

KIRLIN, CAMPBELL & KEATING,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1965.

No. .....

MICHIGAN MUTUAL LIABILITY COMPANY, Insurance Carrier, and PITTSTON STEVEDORING CORPORATION, Employer,

Petitioners,

against

PHILIP F. ARRIEN, Deputy Commissioner Second Compensation District, Bureau of Employees Compensation, United States Department of Labor, and ISIDORO PARISI,

Respondents.

REPLY BRIEF OF PETITIONERS.

This reply brief is necessary in order to clarify the setting of this case and to clear up any misapprehensions the Court may have by reading respondent's brief, which obfuscates the important question of whether the determination was made "in accordance with law" by attempting, unfairly, to place this claim in the muddy waters of an isolated factual setting.

In stating the question presented, the respondent fails to note the important fact that the "platform temporarily extending over navigable waters" (p. 2)* was a platform the sole purpose of which was to extend the working area of the pier and in fact is a physical extension of the pier.

Both the Commissioner and the courts below clearly recognized that the skid served no other purpose. It was

* References are to pages of Respondent's brief.

not a gangway, nor was it a means of ingress to or egress from the vessel. (Compare definition of "gangway" and standards for "gangways" in safety and Health Regulations for Longshoring of the Department of Labor, 29 C. F. R. Part 1504 [Sub-part A 1504.3, (k) and Sub-part B 1504.11] referred to at page 5 of the petition).

Respondent also has resurrected the suggestion contained in the Commissioner's report that the save-all net running from the outboard side of the skid to the rail of the ship has significance, stating "so that the skid was physically attached to the vessel as well" (page 4). However, the respondent fails to inform the Court that this net was only loosely slung between the skid and the ship and its sole purpose was to catch cargo which might fall from the ship's tackle as cargo was being loaded or unloaded.

Moreover, the respondent fails to state that this save-all net is used on all occasions even where the stringpiece is wide enough so that a skid is not required. Yet, no one has ever suggested that because there is such a net between the wharf and the pier, that the pier thereby becomes an appurtenance of the ship. A loosely slung net is far less an attachment between the ship and the wharf than are the mooring lines which secure the ship to the wharf.

On page 4, the respondent makes the irrelevant and immaterial observation that "On occasions, however, the cables are attached instead to the ship, so that the skid is supported by the ship". Again the respondent fails to point out that this is done only when long steel beams and similar lengthy objects are being loaded into or discharged from a vessel. When operating with cargo of that type, the cables on the outboard side of the skid are attached to the ship so that these cables will not interfere with the handling of such cargo as would be the case if they ran to the stanchions on the pier. More importantly, no such cargo

operations were being performed at the time Parisi sustained his injuries.

The emphasis by respondent of the characterization of the Court of Appeals and by the Deputy Commissioner that the skid is a device used to "bridge" the space between the ship and the wharf, thereby likening it to a gangplank, is misplaced. The skid is not used as a bridge over navigable waters. Its sole purpose is to extend the working area of the narrow stringpiece. It is physically attached to the stringpiece and is just as necessary an appurtenance to the pier as is a wide stringpiece, where the use of a skid is not required. The misconception is urged to bolster the argument that the skid serves a purpose similar to a gangplank. A gangplank is an appurtenance which supplements the ship and is used solely as a means of ingress to and egress from the vessel. On the other hand, the skid or platform involved in this case is used for no other purpose than to extend the working area of the pier. It cannot be analogized to a gangplank.

The statement in respondent's brief (page 6) that there is no conflict in decisions is based on the argument indulged by the Court of Appeals that the cases directly in conflict with the present holding are obsolete, outdated and outmoded. No matter how the respondent attempts to distinguish *Smith & Sons, Inc.*, v. *Taylor*, 276 U. S. 179, case from the present case, the fact is that *Smith* held that a skid indentical with the one used in this case is an extension of the land.

Respondents argue strenuously that the legislative history compels a finding that Parisi's injury was one which occurred "between the wharf and the vessel" relying on Senate Report 973, 69th Congress, 1st Session, Page 16. But, what Congress meant was that an injury occurring on the working area of the pier—in this case a skid whose sole

purpose was to extend the pier's working area—was not an injury occurring between the wharf and the vessel.

The words in the Senate Report were intended to encompass an injury on a distinctively separate object, such as a raft or "camel" between the wharf and the vessel. Contrariwise, a physical extension of a pier or vessel is not "between the wharf and the vessel" even if it is removeable. A "skid" extending the area of the pier is an appurtenance of and an extension of the pier, while a gangplank is an appurtenance of and extension of the vessel and not an appurtenance of the pier.

The skid in this case was not a bridge "over navigable waters" and thereby "upon navigable waters" as the respondent argues. It was merely an extension of the pier.

To say that the words "upon navigable waters" are synonymous with the words "over navigable waters"* is to pervert the plain language of the Act.* There are bridges over navigable waters which permanently remove the waters beneath them from navigation when in their useful position, but which, when raised, permit full and complete navigation under them. Yet, no one has ever urged, nor does respondent, that an injury occurring upon such a bridge would be one occurring "upon the navigable waters".

Although it seems apparent that this Court in *Calbeck* v. *Travelers Insurance Company,* 370 U. S. 114 laid at rest the "twilight zone" and "local concern" concepts, the respondent urges that this court should revert to that outmoded theory in deciding this case. In the first place, this is not a "twilight zone" nor a "local concern" case. This is an injury occurring upon an extension of a wharf and thereby compensable only under the State Act.

---

* The Act to which reference is made is the Longshoremen's and Harbor Workers' Compensation Act hereinafter referred to as LHWCA.

Davis v. *Department of Labor*, 317 U. S. 249 the parent of the "twilight zone" concept, has no application to the facts in the present case.

Davis dealt solely with the *status* of the injured employee. In *Davis* the injured man was working upon navigable waters on a barge and the sole question there was whether LHWCA contemplated that such a person working in dismantling a structure *over* navigable waters but injured *upon* navigable waters was one who was covered under the Act.

The respondent does admit that the courts below did not rely upon the "fact" that the injuries involved here occurred in part through claimant's actually falling into navigable waters. Nevertheless, it urges in footnote 4, page 6, that this is another ground for sustaining the decision of the Deputy Commissioner. Actually, there is no evidence to support this position. There was testimony that petitioner was saved from drowning but if that is the injury about which respondent is talking in footnote 4, that injury never occurred.

Finally, respondent in footnote 8, last sentence, page 9, states "the unanimous denial of the petition for re-hearing en banc in the present case would, in any event, appear to rebut any assertions of an intra-circuit conflict." The order of the Court of Appeals reads as follows: "No active Circuit Judge having requested that the case be heard en banc, the petition is denied". This plain language can hardly be called a unanimous denial.

Respectfully submitted,

James B. Magnor,
Counsel for Petitioners,
120 Broadway,
New York, N. Y. 10005.

Kirlin, Campbell & Keating,
Of Counsel.